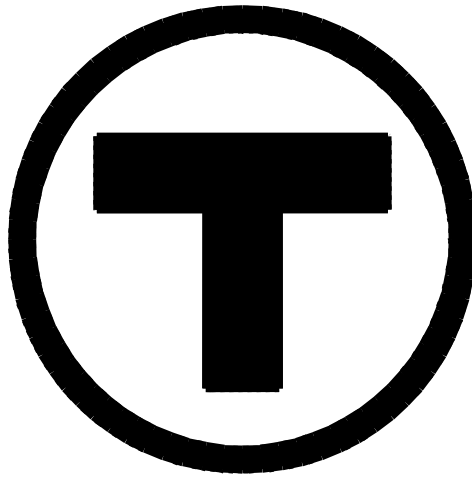




MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

ORGANIZATIONAL CONFLICT OF INTEREST GUIDANCE
GREEN LINE EXTENSION PROJECT

OCTOBER 2016

1. **Background**

This Organizational Conflict of Interest Guidance (this “Guidance”) has been developed by the Massachusetts Bay Transportation Authority (“MBTA”) for application with respect to future participation by entities (each, a “Participant”) and individuals on the Green Line Extension Project (“GLX” or the “Project”), which is being funded, in whole or in part, by the Commonwealth of Massachusetts and the Federal Transit Administration (“FTA”). This Guidance has been developed in furtherance of the MBTA’s objectives of maximizing competition and ensuring fairness amongst entities competing for work on the Project and the FTA’s requirement that all recipients of FTA funding conduct procurement transactions in a way that provides for full and open competition in accordance with 49 U.S.C. § 5325(a). This Guidance will also facilitate the protection of the MBTA’s interests and confidential and sensitive Project information and provide assistance to Participants in making informed business decisions,

The MBTA has advanced and initially procured construction of portions of the Project under the authority of M.G.L. c.30 §39M and Section 62 of Chapter 118 of the Acts of 2012 (the “Special Act”), which authorized the MBTA to pursue the construction manager/general contractor (“CM/GC”) project delivery method for the Project. The MBTA entered into professional services agreements with various consultants, a construction contract for a portion of the Project using the design bid build method, and selected a CM/GC contractor for the balance of the Project under a competitive procurement. The MBTA and the CM/GC contractor entered into various agreements, including a Master Agreement, a Preconstruction Services Agreement, and Interim Guaranteed Maximum Price (“IGMP”) Agreements for certain sections of the Project

(IGMP 1, 2, 3 and 4A) (collectively, the “CM/GC Contract”). The MBTA and the CM/GC contractor were unable to reach agreement on IGMP4.

Prior to pursuing the Project under the CM/GC project delivery method, the MBTA procured the Project Manager/Construction Manager (“PM/CM”) professional services contract anticipating that the Project would be pursued as a design build project. The MBTA also retained the following professional services consultants: (a) a designer to work with the PM/CM and the CM/GC contractor by pursuing the Project design and through the provision of construction phase services (the “Designer”); (b) an “Owner’s Representative” as required by state law; and (c) an independent cost estimator (the “ICE”) to support the CM/GC process.

In December of 2015, the MBTA notified the professional services consultants that it would terminate or revise the scope of their ongoing contracts. The MBTA also notified its CM/GC contractor that it would not utilize the CM/GC delivery method for any further Project construction contracts and kept in place portions of the then active construction under the CM/GC Contract.

The MBTA then established an Interim Project Management Team (the “IPMT”) to perform an assessment and redesign of the Project.

The MBTA is moving forward with a design build procurement process under the authority of M.G.L. c. 149A to procure a contractor to complete the remainder of the Project (the “Contractor Procurement”). The Contractor Procurement will include the portions of the Project that had been a part of the proposed IGMP4 agreement as well as elements that were to be covered by later IGMPs as well as some work formerly covered by the executed IGMPs.

The MBTA has conducted a review of laws, regulations, guidance, policies and contract terms applicable to the determination of whether a conflict of interest or the appearance of a conflict of interest would preclude an entity or an individual from participating in the Contractor Procurement. This Guidance will set forth the basis for these determinations and the process by which it will be determined whether certain entities and individuals will be precluded. For the purposes of this Guidance, any reference to a conflict of interest includes organizational conflicts of interest as well unless specifically noted otherwise.

2. Applicable Laws, Regulations, Guidance, Policies and Contract Terms

2.1 MBTA Procurement Policies

The MBTA Procurement Manual (the “Manual”) provides that the MBTA shall ensure full and open competition through the use of competitive procedures in accordance with the requirements of the Manual and FTA Circular 4220.1F Third Party Contracting Guidance. The Manual defines an organizational conflict of interest in Section 1.2.2.11 and discusses preclusion issues in Section 1.6.

Under the Manual at Section 1.2.1.11, an organizational conflict of interest arises under the following circumstances:

- a. Lack of Impartiality. When the contractor is unable, or potentially unable, to render impartial assistance or advice to the recipient due to other activities, relationships, contracts, or other circumstances;
- b. Impaired Objectivity. When the contractor's objectivity in performing the contract work is or might be otherwise impaired due to other activities, relationships, contracts, or other circumstances; and
- c. Unfair Competitive Advantage. The contractor has an unfair competitive advantage.

Under the Manual at Section 1.6 Preclusion, a designer, programmer, consultant or key subconsultant that performs a feasibility study, master plan or program for a project is ineligible for a subsequent appointment or employment to perform design development services for that project, unless sound reasons in the public interest otherwise dictate.

2.2 Federal Law

Under federal law, recipients of aid from the United States Department of Transportation ("DOT") must conduct procurement transactions in a way that provides "full and open competition as determined by the Secretary." 49 U.S.C. § 5325(a). Office of Management and Budget regulations applicable to procurements by third-party grantees of DOT provide that "contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements," and list organizational conflicts of interest as among "the situations considered to be restrictive of competition." 2 C.F.R. § 200.319(a).

FTA guidance (see FTA Circular 4220.1 F.VI.2.a(4)(h)) provides that an organizational conflict of interest can arise when a contractor: (1) is unable to provide impartial or objective assistance to the agency; (2) has unequal access to non-public information; or (3) has been allowed to establish biased ground rules. See *also* FTA's Best Practices Procurement Manual, section 2.4.2.2.2.E, "An organizational conflict of interest occurs where—because of other activities, relationships, or contracts—a contractor is unable, or potentially unable, to render impartial assistance or advice to the grantee; a contractor's objectivity in performing the contract work is or might be otherwise impaired; or a consultant has an unfair competitive advantage."

FTA requirements prohibit both real and apparent conflicts of interest. FTA's Best Practices Procurement Manual 2.4.2.2.2F instructs FTA grantees to determine whether an apparent conflict of interest exists based on whether a reasonable person with all the material facts would believe there appears to be a conflict. For the purposes of this Guidance, any reference to a conflict of interest refers to the appearance of a conflict of interest as well unless specifically noted otherwise.

2.3 State Law

Certain state statutory provisions are also applicable.

The participation of certain contractors and individuals are restricted by M.G.L. c 268A, the Massachusetts Conflict of Interest Law.

The provisions of M.G.L. c. 30 § 39M½ and M.G.L. c.149A §15 ½ require that the owner's representative for a project be wholly independent of the designer, general contractor or any subcontractor involved in the public works project .

Under M.G.L. c. 149A, §18: "The design professional retained to provide technical assistance and consulting services to the awarding authority shall not be eligible to participate in any way as a member of the design build entities competing for the award of the design build contract."

2.4 MBTA Contracts and Other Requirements

This Guidance is also based on provisions of the professional services contracts, the CM/GC Contract, and other requirements the MBTA has put in place for the Project.

The CM/GC Master Agreement at Section 10.3 provides: "The CM/GC shall not have the right to construct the work related to the failed Interim GMP Agreement and shall not be eligible to rebid the work. If one or more of the CM/GC's subcontractors, however, was not significantly involved in determining the price for the unsuccessful Interim GMP Agreement, such subcontractor shall be eligible to participate in a re- procurement of the work...." See also CM/GC Pre-Construction Services Agreement at Section 5.4.1; GLX CM/GC Procurement Manual at Section 4.27.1.

The advertisement for the PM/CM services stated "The Prime Consultant and all subconsultants selected to perform the services requested in this public solicitation shall be precluded from performing any work on the design build contract to be awarded for the Green Line Extension Project."¹

The Owner's Representative contract requires the Owner's Representative to be wholly independent of the designer, general contractor or any subcontractor involved in the Project.

The advertisement for the design services contract for the Project stated: "The Prime Consultant and all subconsultants selected to perform the services requested in this public solicitation shall be precluded from performing any work on any Construction Manager/General Contractor (CM/GC) or Design-Bid-Build contract to be awarded for the Green Line Project."

The advertisement for the independent cost estimating services stated: "The ICE and all subconsultants selected to perform the services requested in this public solicitation shall be precluded from performing any work on any contract related to the Green Line Extension Project including without limitation (i) any Construction Manager/General Contractor (CM/GC) or Design-Bid-Build contract to be awarded for the Green Line Extension Project; (ii) the Program/Manager/Construction Manager contract; and (iii) the Advanced Preliminary Engineer/Final Designer contract."

¹ Note, however, that this language was included when the Project was intended to be procured as a design build project. Subsequently, the Project was procured as a CM/GC project and the PM/CM remained in place.

3. Rules for Determining Conflict of Interests

The following rules are applicable to the Contractor Procurement with respect to conflicts of interest. The following may not participate in the Contractor Procurement. In some cases entities are subject to more than one of these rules.

Entities that are unable or potentially unable to provide impartial assistance to the MBTA, or whose objectivity in performing the contract is or might be otherwise impaired, due to other activities, relationships, contracts, or circumstances.

Entities that have an unfair competitive advantage including through access to non public information which information cannot be made public or the unfair advantage otherwise cured.

Entities that performed a feasibility study, master plan or program for the Project are ineligible to perform design development services unless the MBTA determines in its sole discretion that sound reasons in the public interest otherwise dictate.

Entities that have developed or drafted specifications, requirements, statements of work, or invitations for bids or requests for proposals or otherwise have helped establish the ground rules for the Project.

Entities whose participation would create the appearance of a conflict of interest.

Entities precluded from participation under M.G.L. c. 268A.

Entities that are precluded from participation due to the terms of a prior procurement or contract.

Application of these rules results in a determination by the MBTA that the following specific entities will be precluded from the Contractor Procurement. Note that the fact that an entity is not specifically listed does not mean that the entity may not be later determined to be precluded. An updated list of precluded entities will be published concurrently with the Request for Qualifications.

The CM/GC entity and the firms comprising the CM/GC entity.

Subcontractors of the CM/GC that significantly participated in the pricing of the work included in any unsuccessful IGMP that is included in the work that is the subject of the Contractor Procurement.

The PM/CM entity and the individual firms comprising the PM/CM entity.

The Designer entity and the individual firms comprising the Designer.

The individual providing Owner's Representative services, the entity with which the MBTA has contracted for the Owner's Representative services and all entities working under the Owner's Representative contract.

The ICE entities and all entities working under the ICE contract.

Members of the Interim Project Management Team.

Any “design professional” as defined in M.G.L. c. 149A retained to provide technical assistance and consulting services to the MBTA.

4. Conflict of Interest Determination for Entities

The determination as to whether a conflict exists under M.G. L. c. 268A for any entity is a matter to be addressed and decided upon by the Commonwealth’s State Ethics Commission.

The MBTA shall determine whether an organizational conflict of interest exists with respect to an entity and whether the conflict would result in that entity being precluded from participation in the Contractor Procurement or whether any conflict could be waived, avoided, neutralized, or mitigated (the “Determination”). By applying these rules, the MBTA will determine whether certain entities that have participated in the Project will be precluded from participating in the Contractor Procurement. The ability of entities to participate in the Contractor Procurement shall be determined concurrently with the procurement process.

5. Process for Determination of Conflicts of Interests

Determinations shall proceed in accordance with instructions provided by the MBTA in this Guidance and the solicitation documents.

Any Participant listed in a Statement of Qualifications will be required to complete and submit the MBTA GLX Disclosure Form (the “Form”) attached as Exhibit A as part of the Statement of Qualifications. Participants seeking an advance Determination as to that Participant’s conflict of interest status are encouraged to submit the Form as soon as possible in advance of the Statement of Qualifications due date.

The Form shall be submitted by email to MHinkleGLX@mbta.com:

Participants must submit details of any conflict of interest issues as they currently or potentially exist. In the event of a conflict of interest, Participants must provide the MBTA with recommendations to avoid, neutralize or mitigate the conflict, in compliance with FTA and all other applicable requirements. The MBTA shall review the Form and may request additional information to assist its review. The MBTA at its discretion may conduct additional research or conduct meetings to gain supplemental information. The MBTA will make the final Determination as to whether a conflict of interest exists and whether the Proposer’s recommendations to avoid, neutralize, or mitigate it are sufficient.

In making any Determination, the MBTA may consider all applicable circumstances and factors such as whether any conflict of interest is of an indirect, remote or de minimis nature and whether there are sufficient qualified and skilled entities available. The MBTA may also decide that there are sound reasons in the public interest that would allow a conflict of interest to be waived or mitigated through, for example, the

implementation of suitable safeguards to mitigate any conflict of interest. These safeguards may include without limitation, ethical walls and procedures for segregation of personnel and information.

Any Determination shall be made in the MBTA's sole discretion.

6. Request for Review

Following any Determination by the MBTA any Participant shall have the right to request that the MBTA review its Determination that a conflict of interest exists with respect to such Participant's participation in the Contractor Procurement. Any request for review of the Determination shall contain any additional information relevant to the Determination and shall be submitted within three (3) business days after the date of the Determination by email to MHinkleGLX@mbta.com.

The MBTA will review all facts of the request for review and will make a final Determination. The MBTA will use its best efforts to advise the interested party of its decision within five (5) business days of receipt of the request for review. If the matter requires further evaluation, the MBTA will notify the Participant in writing of the extended review period. A final written response will be issued by the MBTA upon final review of the matter. Any decision on a review of the Determination shall be made by the MBTA in its sole discretion and shall be final and binding on all entities.

7. Conflict of Interest Determinations for Individuals

The determination as to whether a conflict exists under M.G.L. c. 268A for any individual is a matter to be addressed and decided upon by the Commonwealth's State Ethics Commission.

If the MBTA determines that a potential or actual organizational conflict of interest exists for a Participant, an organizational conflict of interest shall also be considered to apply to any employee of such entity that has participated in a material way in the performance of work giving rise to the determination. If such individual leaves the entity's employment, the potential or actual organizational conflict of interest shall apply to such individual in the same manner as it applies to the entity. However, the individual's new employer will not be considered to have an organizational conflict of interest provided the new employer adopts and implements safeguards and mitigation measures satisfactory to the MBTA in its sole discretion.

8. Certification

Representatives and/or employees of the Participants shall be required to certify from time to time, in a form approved by the MBTA, that in connection with the services on the Project, they are in full compliance with the provisions of M.G.L. c.149A and M.G.L. c.268A and all other applicable requirements.

9. Conflict of Interest during Project

The MBTA reserves the right to: a) require any Participant to take any action necessary to remove any conflict of interest; or b) to terminate or amend any contract with the Participant if, in the reasonable opinion of the MBTA, any such personal or business relationship would constitute, or have the potential to create, a conflict of interest that cannot be remedied. Participants must disclose in writing any conflicts of interest occurring during the period of performance for the Project and, upon request of the MBTA, supply the MBTA with such information the MBTA determines to be necessary to determine whether a conflict of interest exists. Participants shall consult with the MBTA to learn what action must be taken to resolve such conflicts and comply with all applicable laws and policies.

10. Conflict of Interest Statements

All solicitations, requests for qualifications, and requests for proposals issued by the MBTA in connection with the Project shall require as a condition of response that Participants shall execute a "Conflict of Interest Certification" substantially in the form attached as Exhibit B.

11. Failure to Comply with Guidance

If the MBTA determines, in its sole discretion, that a Participant has failed to comply with this Guidance in any respect (including any failure to disclose an actual, perceived or potential conflict of interest) or with the terms of any Determination, the MBTA may take appropriate action which may include without limitation, preclusion of the Participant and any of its parents, affiliates, subsidiaries, subcontractors or subconsultants; requiring the implementation of mitigation measures; or cancellation or amendment of any contract under which the Participant is working on the Project and such termination may be deemed to be a termination for default by the Participant. In the event of any such termination the MBTA shall not be liable for the reimbursement of all or part of the costs incurred or alleged to have been incurred by the Participant or any of its parents, affiliates, subsidiaries, subcontractors or subconsultants. Additionally, the MBTA shall be entitled to recover any and all payments made to the Participant subsequent to the date when the Participant became aware of or should have become aware of the existence of the conflict of interest.

EXHIBIT A

MBTA GLX Disclosure Form **Organizational Conflicts of Interest**

This Form will be used by the MBTA to assist in the Determination as to whether an organizational conflict of interest exists with respect to an entity and whether the conflict would result in that entity being precluded from being a Participant in the Contractor Procurement or whether any conflict could be waived, avoided, neutralized, or mitigated. Capitalized terms shall have the same meaning as set forth in the MBTA's Organizational Conflict of Interest Guidance, Green Line Extension Project.

This Form may be supplemented with additional materials as necessary to fully and completely respond to the issues that are presented. The Form may be copied and reproduced as necessary.

All information submitted to the MBTA is submitted under penalty of perjury and will be considered a public record unless it is specifically exempted from disclosure under Federal or state law.

1. Name of entity:

2. Proposed role on GLX:

3. Prior experience on GLX (be as specific as possible):

4. Does the entity or did the entity have a contract with the MBTA for GLX? _____

5. Is the entity or was the entity a subcontractor or subconsultant to an organization that has or had a contract with the MBTA for GLX? Identify the organization(s) and the MBTA contract(s).

6. Does the contract or subcontract or did the contract or subcontract contain any language on organizational conflicts of interest or did it address the entity's involvement in future work related to GLX in any way? _____

7. What does (did) the language provide? You may attach specific provisions.

8. Has the entity significantly participated in the pricing of any portion of GLX included in an unsuccessful IGMP that is or could be a part of the proposed procurement? Provide details of participation. _____

9. Has the entity worked for the MBTA or for the Massachusetts Department of Transportation in the performance of a feasibility study, master plan or program for GLX? _____

10. If the answer to either of the previous two questions is yes (in either case) are there reasons in the public interest that the entity should not be precluded from further participation on GLX? Explain. _____

11. Is there any reason that the entity is or might be unable, or potentially unable, to provide impartial and objective assistance or advice to the MBTA due to other activities, interests, relationships, contracts, or circumstances? Explain. _____

12. To the best of the entity's knowledge, after diligent inquiry, are any of its directors, officers, owners, or employees unable, or potentially unable, to provide impartial and objective assistance or advice to the MBTA due to other activities, interests, relationships, contracts, or circumstances? Explain. _____

13. Is the entity in possession of any information related to GLX as a result of previous involvement in GLX that is not generally available to the public? Explain. _____

14. Does the entity believe that it has or may have an unfair competitive advantage through its possession of nonpublic information or for any other reason? Explain. _____

15. Has the entity established or been involved in the establishment of the ground rules for the Design Build procurement for GLX by developing specifications, requirements, statements of work, invitations for bids, requests for proposals, evaluation factors, or similar documents? Explain. _____

16. If the answers to any of the previous five (5) questions is yes, does the entity have a recommendation on how an organizational conflict of interest or potential organizational conflict of interest involving the entity can be avoided, neutralized, or mitigated? Explain. _____

17. For the purposes of compliance with Mass. Gen. L. c. 149A, s. 18, has the entity been retained as a "design professional" to provide technical assistance and consulting services on GLX? Explain. _____

18. Is the entity or any employee of the entity a "state employee" pursuant to the definition provided in section 1(q) of Mass. Gen. L. c. 268A? _____

To the extent that the entity or any employees of the entity are or may be considered "state employees" for the purposes of Mass. Gen. L. c. 268A, the State Ethics Commission should be consulted to determine how their involvement in GLX may present a conflict of interest. To the extent that the entity and the individual are willing to share any information from the State Ethics Commission, please voluntarily provide that as an attachment to this Form. It is not a requirement.

19. Has any employee of the entity worked on GLX for an entity that has been determined to have a conflict of interest? Did that employee participate in a material way in the performance of the work giving rise to that determination? Explain. _____

20. Does the entity believe that a reasonable person with possession of all the material facts as disclosed on this Form would believe that there appears to be an organizational conflict of

interest with respect to the entity's involvement in the GLX procurement? Explain.

21. A "parent" as used in the Policy is an organization that controls the entity through, for example, the ownership of stock or the exercise of management control. Has any parent of the entity been involved in GLX? If yes, identify the parent(s). _____

22. If the answer to the preceding question is "yes", please supplement the entity's response by explaining the parent's role in GLX and informing the MBTA whether the entity's answer to any question should be modified as a result of that role.

23. An "affiliate" as used in the Policy is an organization that is officially connected to or attached to the entity. Has any affiliate of the entity been involved in GLX? If yes, identify the affiliate(s). _____

24. If the answer to the preceding question is "yes", please supplement the entity's response by explaining the affiliate's role in GLX and informing the MBTA whether the entity's answer to any question should be modified as a result of that role.

25. A "subsidiary" as used in the Policy is an organization that is controlled by the entity through, for example, the ownership or stock or the exercise of management control. Has any subsidiary of the entity been involved in GLX? If yes, identify the subsidiary(ies). _____

26. If the answer to the preceding question is "yes", please supplement the entity's response by explaining the subsidiary's role in GLX and informing the MBTA whether the entity's answer to any question should be modified as a result of that role.

27. Please provide any information regarding whether any organizational conflict of interest or potential organizational conflict of interest involving the entity is of an indirect, remote or "de minimus" nature and/or whether there are sound reasons in the public interest that would allow a conflict of interest to be waived or mitigated.

28. Has the entity conducted a diligent inquiry and search to ascertain the full extent of the entity's knowledge with respect to its involvement in GLX? Explain. _____

The entity certifies that all of the answers provided in this Form are made truthfully, to the best of the entity's knowledge and belief and that no interest exists that is required to be disclosed on this Form, other than as described above. The entity further certifies that should it obtain knowledge: (a) that is inconsistent with the answers provided in this Form; or (b) of any set of facts potentially giving rise to a conflict of interest under Federal or state law or MBTA policy, it will disclose such facts to the MBTA as soon as reasonably possible.

The undersigned certifies that the undersigned is authorized to answer these questions on behalf of the entity and to bind the entity (please attach evidence of authority).

Signed under the penalties of perjury on this _____ of _____, 2016.

ENTITY NAME

NAME
duly authorized

Email address: _____

EXHIBIT B
CONFLICT OF INTEREST CERTIFICATION

Except as set forth in its MBTA GLX Disclosure Form, dated _____,
_____ certifies that it has no real or perceived conflict of
interest in relation to services of the MBTA contract E22CN07 Green Line Extension
Design Build Services and furthermore agrees to take any action or supply any
information necessary should a conflict of interest arise consistent with the MBTA's
Guidance, policies and other applicable requirements.

Authorized Signature: _____

Title or Position: _____

Date: _____

**Please attach any Determination issued by the MBTA relative to conflicts of
interest for the certifying entity.**